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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL.

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY FIRST MORTGAGE 4% BONDHOLDERS' COMMITTEE, ET AL.

(NEW HAVEN INCLUSION CASES)

CONSOLIDATED APPEALS FROM UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK AND ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE APPELLEE, STATE OF CONNECTICUT

I.

INTRODUCTION

Briefs of the appellants-bondholders, and the New Haven Trustee, and appendices thereto, filed with the Court in these proceedings, set forth appropriate jurisdictional statements, review of prior proceedings, and requisite statutory references.

II.

QUESTION PRESENTED

Did the former right of the New Haven Railroad (NHRR) to use Grand Central Terminal facilities for the operation of rail passenger service constitute an interest for which NHRR creditors can claim compensation?

III.

STATEMENT

Following two proceedings before the United States Supreme Court, on February 1, 1968, the Pennsylvania Railroad and the New York Central Railroad merged to form the Penn Central Transportation Company. Pursuant to the Interstate Commerce Commission (ICC) order approving such merger, by the act of merging, the new company had the obligation to include the bankrupt NHRR under conditions to be approved or prescribed by the ICC.

On August 10, 1968, the United States District Court for the District of Connecticut, sitting as a Court of Bankruptcy, issued its order (New York, New Haven and Hartford Railroad Company, Debtor, Docket No. 30226, Memorandum of Decision on Reorganization Plan, App. 237a, et seq.), remanding to the ICC the plan of reorganization and calling upon the ICC to require physical inclusion of the NHRR in Penn Central "* * * not later than January 1, 1969, leaving the price and other terms of the inclusion to be determined later." App. 245a. The Court emphasized that unless this was done, it would be compelled to entertain a motion to dismiss the reorganization proceedings and all trains would stop in January, 1969.

In response to this critical situation, the ICC issued its order of November 25, 1968, App. 112a, et seq., prescribing

terms of inclusion and requiring such inclusion by January 1, 1969. Fourth Supplemental Report, 334 ICC 25 (1968).

In further proceedings before both the Bankruptcy Court in Connecticut and the District Court for the Southern District of New York, Penn Central unsuccessfully sought to delay this takeover date, until conclusion of litigation over price it would be compelled to pay for New Haven Railroad properties.

On December 31, 1968, Penn Central took physical possession of all NHRR operating properties and has been operating this railroad as part of its large trunkline system.

IV.

INTEREST OF STATE OF CONNECTICUT

Creditors of NHRR are appealing from the determinations of the United States District Court for the District of Connecticut and the United States District Court for the Southern District of New York, with respect to the price that Penn Central should pay for the rail properties of the bankrupt NHRR. The interest of the State of Connecticut in these proceedings is to support that portion of the decisions of the Courts which reaffirm the consistent holdings of the ICC that no value can be assigned to the former right of the NHRR to offset Grand Central Terminal property income against costs incurred in using the Terminal for operating trains in Connecticut-New York rail passenger service.

V.

SPECIAL MASTER REPORTS

This matter has been exhaustively reviewed by the Courts and the ICC. A Special Master, Honorable John Van

Voorhis, was appointed by the United States Circuit Court Judge Robert P. Anderson, sitting by designation in the NHRR bankruptcy proceedings in the Connecticut District Court, for the specific purpose of determining the interest of the NHRR in Grand Central Terminal properties, and to report thereon to the Court.

Judge Van Voorhis noted that this matter had been before the United States Supreme Court in the case of *ICC v. New York, New Haven and Hartford Railroad Company*, 287 U.S. 178, in which this Court ruled that the interest of NHRR in these non-operating properties could not be used as part of the base for rate making purposes. App. 281c.

In the report submitted to the Court on June 17, 1968, the Special Master determined as follows: "I find the bondholders' contention to be untenable that New Haven has a complete undivided interest in the Grand Central Terminal non-operating properties, appraised at $227,225,000 (subject to capitalization of the minimal rental)." App. 274c.

This ruling was made following detailed analysis of the nature of NHRR's interest in these properties and the history of the joint venture constituting the relationship between the former New Haven Railroad and the former New York Central Railroad. These Railroads entered into an arrangement to finance improvements made in the Grand Central Terminal area in the early 1900's. Such improvements included the erection of the terminal building, laying the tracks below street level, and electrifying the system.

As Judge Van Voorhis pointed out, this work "* * * resulted in converting a smoky railroad ditch, shunned by all who could afford to keep away from it, into one of the most famous and sought after of streets anywhere." App. 260c.

The Special Master referred extensively to the "Biltmore case," *New York Central R.R. Co.* v. *The New York, N. H. and H. R.R. Co.*, 24 Misc. 2nd 414; affirmed 11 N.Y. 2nd 1077; in which the New York Court held that NHRR had the status of a partner or joint venturer with respect to passing on the management of Grand Central properties.

In analyzing the agreements between NHRR and New York Central, Judge Van Voorhis determined that after meeting the costs of the buildings out of earnings, "* * * all further revenues from the non-operating properties as well as from concessions in the Terminal Building proper should go into so-called 'Terminal Account,' provided for by Paragraph 14 of the Agreement of 1907. That paragraph commits these revenues to be applied upon the obligation of both railroads to pay the fixed charges and expenses of maintenance and operation of the Terminal more particularly defined in paragraph 4." App. 275c.

Thus, Judge Van Voorhis ruled that under the agreements between NHRR and New York Central, non-operating property revenues were dedicated to defray the expenses of operating the Terminal.

In light of this dedication, and so long as the trains continued to operate, the Special Master determined that the issue was the value of NHRR's interest in the excess of non-operating property income over the expenses incurred in operating the Terminal. He stated: "After payment of the terminal expenses, the overflow from the Terminal Account reverts to the equal joint venture which has been found to exist in the Biltmore case regarding these non-operating properties." App. 282c. (In its decision of November 25, 1968, the ICC found that NHRR's interest in this excess income has a liquidation value of $28,887,000. App. 126a.)

In his supplemental report of July 22, 1968, the Special

Master summarized his determinations as follows: "* * * in my opinion (except for the final reimbursement to New Haven of its advances toward the construction of the Waldorf-Astoria Hotel to be made in 1968) whatever right, title or interest the New Haven has in the so-called Grand Central Terminal properties is to be measured by the capacity of the Grand Central Terminal Account (established by Paragraph 14 of the agreement of July 24, 1907, between Central and New Haven) to throw off surplus revenue." App. 293c.

VI.

INTERSTATE COMMERCE COMMISSION FINDINGS

Both the District Court for the Southern District of New York and the District Court for the District of Connecticut remanded to the ICC the proposed reorganization plan of the NHRR. On November 25, 1958, the ICC issued its Fourth Supplemental Report and Order in Finance Docket No. 21989, 21990, 24361 and 21669, concerning New Haven inclusion in the Penn Central system. App. 112a, et seq.

The ICC took cognizance of the reports of the Special Master which had been made a part of the ICC's record. The ICC decision referred to the request of the Reorganization Court to decide "* * * what value, if any, attaches to NH's right to free use of Grand Central Station." App. 119a.

The Commission determined that: "In liquidation, the right to free use of the terminal would have no value to NH unless there were a buyer willing to pay for such use." App. 119a.

The ICC reviewed the possibility of the State of New York as a buyer and concluded as follows: "Hence, such free use is valueless. We agree with the three-judge court that no such buyer is in sight, that the State of New York would

need to pay for only the net cost of operating into the terminal and that this is indeed an 'extravagant claim' of the creditors." App. 119a.

In a footnote to this portion of the opinion, the Commission stated as follows: "Although NH's right to excess income could survive liquidation, it does not follow that free use of the terminal would be assignable. The bondholders' 'free use' argument is in a real sense no more than an attempt to revive their argument, rejected by us and the courts, that NH is entitled to one-half interest in the terminal income *before* terminal expenses." App. 119a.

VII.

DECISIONS OF DISTRICT COURT, DISTRICT OF CONNECTICUT

On May 28, 1969, the United States District Court for the District of Connecticut issued its Memorandum of Decision on the price to be paid for the debtor's assets. New York, New Haven and Hartford Railroad Company, Debtor, In Docket No. 30226 (D. Conn.), Memorandum of Decision on the Issue of the Price to be Paid for the Debtor's Assets, App. 277a, et seq.

United States Circuit Court Judge Robert P. Anderson, sitting by designation in this District Court proceeding, ruled as follows: "The claim that there is value to the New Haven's right of access to the Grand Central Terminal requires some comment in view of this court's suggestion in its August 13, 1968 opinion that the Commission consider and make findings as to what value, if any, attached to what the court considered a valuable interest. After reading the briefs and hearing the arguments of all those who urged this point, and those opposed, the court is now satisfied that the Commission's treatment of the matter must stand. The Special Master and the

three-judge court concluded there was no value in the interest, principally because it is not the kind of interest that would survive liquidation; nor, if it did, could it be assigned. Moreover, there was no evidence that the expenses of maintaining the terminal would be any less." App. 294a.

The Court noted further that it was highly speculative to expect any public authority to pay for the use of the terminal "* * * in view of the bargaining positions of the states and the disposition of the ICC to require Penn Central to furnish such access free of charge to a state or public authority which assumed the commuter service, as a condition of Penn Central's getting rid of that much of the losing and burdensome passenger service." App. 294a.

VIII.

DECISIONS OF DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

On June 18, 1969, the United States District Court for the Southern District of New York issued its decision on the appeal taken from the November 25, 1968 order of the ICC (Remand Report, 334 ICC 25), concerning the adjusted price that Penn Central should pay for NHRR properties. App. 400a, et seq.

The Court ruled that: "Unless someone could be found to take over NH's operations into GCT, the right to have terminal income applied to expenses could not be sold to anyone even if the anti-assignment clause in the contract was not the obstacle that it may be." App. 419a. The Court stated further: "While we do not disagree with the bondholders' position that a state must pay the salvage value of property of a defunct railroad that it wishes to acquire, what is the 'salvage value' of property that cannot be sold to anyone else and is of no value in the owner's hands?" App. 420a.

While Judge Weinfeld dissented, in part, from the majority decision, he did not dissent from this portion of of the decision.

IX.

POSITION OF STATE OF CONNECTICUT

We cite the foregoing decisions to demonstrate to the Supreme Court that it has been consistently held by the ICC and both the Connecticut and New York District Courts that NHRR creditors can claim no value for that portion of the Grand Central Terminal income which offsets the cost of operating Connecticut-New York passenger trains in and out of Grand Central Terminal. If the former NHRR had discontinued the use of Grand Central Terminal, it would have lost the right to offset terminal area income against its applicable share of the cost of operating the terminal, in accordance with the terms of the agreement between New York Central and NHRR. Thus, the NHRR has nothing to convey and no value can be assigned to this portion of its interest in the Grand Central properties.

What did the NHRR "own" in the Grand Central property complex? It "owned" only the right to offset property income against the cost of train operations, plus an interest in excess income.

This Court has ruled that NHRR's interest is not a property interest for the purpose of establishing a rate base; 287 U.S. 178.

Paragraph 14 of the 1907 agreement between the NHRR and New York Central states that the NHRR "owned" an interest in having "* * * all such rentals or other compensation so received, and not belonging exclusively to either Company * * * (to be) credited to the fixed charges or to

the cost of maintenance and operation of the said Railroad Terminal * * *." App. 165c.

In light of this unequivocal language, NHRR creditors have no standing to claim a benefit without assuming the concomitant obligation to operate the rail passenger service into and out of Grand Central Terminal.

While the supplemental agreement of 1913 (App. 176c, et seq.) provided generally for reimbursement of investments, no change was made in the Paragraph 14 provisions, which dedicated property income to the expense of operating the Terminal.

The ICC, the Special Master, and the Connecticut and New York District Courts have consistently ruled that NHRR's interest in the Grand Central Terminal area is limited to the "excess income," namely, that portion of the income that has exceeded NHRR's share of the cost of operating the Terminal.

Arrangements have been negotiated among Connecticut, New York and Penn Central to preserve and modernize rail passenger service between Connecticut and Grand Central Terminal, New York.

On November 25, 1969, a Memorandum of Intent was signed by the parties, based on the historic contractual arrangement between the former NHRR and the New York Central Railroad. This Connecticut-New York-Penn Central agreement provides that Grand Central Terminal income shall continue to be dedicated to offset the Terminal costs of operating passenger trains in Connecticut-New York service.

With necessary Federal support, Connecticut and New York are undertaking a capital investment program of over $80,000,000 to modernize this service, including acquisition of new cars and improvement of stations and other facilities.

This program is predicated upon the foregoing arrangements for the use of Grand Central Terminal for the operation of this vital interstate rail passenger service.

Counsel for the creditors contend that there are two buyers for the right to use Terminal income to offset train expense, namely, Penn Central and the States. This argument assumes that there was something to sell. This argument reasserts the consistently refuted claim of the creditors for a 50% interest in the total Grand Central property complex valued at $227,255,000.

The exhaustive findings of the Special Master, the ICC and the District Courts have totally rejected this claim.

It is also claimed that unless the creditors receive the benefit of this Terminal income — a sum estimated at $5,600,000 per year — it would be a windfall for Penn Central.

The fact is that such terminal income will not be a windfall for anyone. It will continue to be utilized to meet the costs of terminal operation under the agreement executed among the States and Penn Central. Such agreement is specifically designed to continue the substance of the arrangement under which the former NHRR used the terminal.

The Federal Government and the States of Connecticut and New York are committed to modernize this vital public service, and there are no foreseeable circumstances under which it can be claimed that this terminal income will be available for any purpose other than meeting the cost of train operation into the Terminal.

Thus, this factual setting wholly refutes conjectural claims of the creditors, that *if* the ICC permitted the trains to stop, and *if* the States did not assume the burden, the creditors would have at least a nuisance value claim to this revenue.

Connecticut, New York and the Federal Government are cooperating to insure that the trains will *not* stop.

NHRR creditors are asking this Court to require Penn Central to pay for something that NHRR could not sell and from which Penn Central can derive no benefit. We ask the Court to reject this extravagant and unsupportable claim.

X.

CONCLUSION

We ask the Supreme Court to affirm the conclusions of the Courts below which hold that NHRR creditors have no claim for compensation for the former right of the NHRR to use Grand Central Terminal facilities for operation of trains in Connecticut-New York service.

Respectfully submitted,

STATE OF CONNECTICUT

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DATED: March 16, 1970

CERTIFICATE OF SERVICE

I hereby certify that a true copy of this Brief has been mailed on this date, by postpaid, first class mail, to all parties of record.

_____

Dated at Hartford, Connecticut,
this 16th day of March, 1970